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No. 93

In the Supreme Court of the United States

OCTOBER TERM, 1957

HENRY T. McKINNEY, PETITIONER

v.

THE MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

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OPINION BELOW

The United States District Court for the Eastern District of Oklahoma rendered no opinion. The opinion of the United States Court of Appeals for the Tenth Circuit (R. 17–22) is reported at 240 F. 2d 8.

JURISDICTION

The judgment of the Court of Appeals was entered on December 22, 1956 (R. 22). The petition for a writ of certiorari, filed March 21, 1957, was granted on May 6, 1957. 353 U. S. 948. The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether, under Section 9 of the Universal Military Training and Service Act of 1951, petitioner, who had been promoted by respondent to an advanced position upon his return from military service, was entitled to seniority in the new position from the date he would have had the opportunity to qualify for the position had he remained in the continuous employment of the respondent.

STATUTE INVOLVED

Section 9 of the Universal Military Training and Service Act of 1951, 65 Stat. 75, 50 U. S. C. App. 459, provides in pertinent part as follows:

> (a) Any person inducted into the armed forces under this title for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 4 (b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. * * *
>
> (b) In the case of any such person who, in order to perform such training and service, has left or leaves a position (other than a temporary position) in the employ of any employer and who (1) receives such certificate, and (2) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—
>
> * * * * *

(B) if such position was in the employ of a private employer, such person shall—

(i) if still qualified to perform the duties of such position, be restored by such employer or his successor in interest to such position or to a position of like seniority, status, and pay; * * *

unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

* * * * *

(c) (1) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) of this section shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

(2) It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) of this section should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time

of his entering the armed forces until the time of his restoration to such employment.

(d) In case any private employer fails or refuses to comply with the provisions of subsection (b) or (c) (1) of this section, the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, specifically to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action: *Provided,* That any such compensation shall be in addition to and shall not be deemed to diminish any of the benefits of such provisions. The court shall order speedy hearing in any such case and shall advance it on the calendar. Upon application to the United States attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions, such United States attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof specifically to require such employer to comply with such provisions: *Provided,* That no fees or court costs shall be taxed against any person who may apply for such benefits: *Provided further,*

That only the employer shall be deemed a necessary party respondent to any such action.

STATEMENT

The petitioner, an honorably discharged veteran, brought this action against his employer, the Missouri-Kansas-Texas Railroad Company, to enforce re-employment rights arising under Section 9 of the Universal Military Training and Service Act of 1951, *supra*, pp. 2–5.[1] The complaint (R. 2–10) was dismissed by the District Court for failure to state a claim for which relief could be granted (R. 15–16). The facts, as set out in the complaint (R. 2–5), the pertinent terms of the collective bargaining agreement (R. 5–9), and the proceedings in the courts below are as follows:

On September 25, 1950, the petitioner was in the employment of the respondent Railroad as a Relief Clerk—Chief Caller (R. 3). This position came within what was termed the Group 2 classification of employees in the collective bargaining agreement between the Railroad and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (R. 2). On September 26, 1950, the petitioner left his employment for the purpose of training and service in the armed forces. He remained in military service until honorably separated on September 25, 1952. (R. 3.)

[1] The Department of Justice appears for petitioner pursuant to the provisions of Section 9 (d) of the Universal Military Training and Service Act of 1951, *supra*, *pp.* 4–5. Under the same provision, petitioner was also represented in both courts below by the Department of Justice.

While in the service, the Railroad, pursuant to Rule 10 of the agreement (R. 7), bulletined two position vacancies in the Group 1 classification of employees (R. 3–4). The first of these—that of Bill Clerk—was bulletined on September 8, 1952 and filled on September 15, 1952. The second—that of Assistant Cashier—was bulletined on September 10, 1952 and filled on September 22, 1952. (R. 3.) Both positions were filled by men not then in the employ of the Railroad (R. 3).

Rule 5 of the agreement (see page 4 of Ex. A to the complaint, on file with the Court) provides that employees covered by the rules of the agreement shall be in line for promotion; that promotion, assignments, and changes in force will be based upon seniority, fitness, and ability; and that fitness and ability being sufficient, seniority shall prevail. Rule 10 of the agreement (R. 7) provides that employees desiring bulletined positions shall file application with designated officials and within specified time limits. Rule 1 (3) (A) (R. 6) provides that:

> * * * Promotion will be confined to the group herein named, with the exception that employes on positions enumerated in group two (2) will be given preference over nonemployes in the assignment to positions in group one (1), based upon fitness and ability, after the provisions of rule six (6) of this agreement have been complied with, in relation to employes embraced in group one (1).[2]

[2] Rule of the agreement is as follows: "*Vacancies, New Positions.—Rule 6.*—Seniority rights of employes to vacancies or new positions will be governed by these rules." (See Ex. A to complaint).

Because of his absence in military service, the petitioner was unable to make application for either of the Group 1 positions bulletined on September 8 and 10, 1952 (R. 3). Rule 15 of the agreement (R. 7), however, provides that an employee returning after leave of absence may return to his former position, or upon return or within three days thereafter may exercise seniority rights to any position bulletined during his absence. The petitioner applied for re-employment on October 1, 1952, and was re-employed on October 2, 1952. Displacing the incumbent, he was immediately assigned the position of Assistant Cashier, the Group 1 position bulletined on September 10, 1952. (R. 4.) The petitioner, over his protest, was assigned a Group 1 seniority date of October 7, 1952, instead of September 8 or 10, 1952, the dates the two Group 1 positions were bulletined (R. 4).

The petitioner served as Assistant Cashier until the position was abolished on September 4, 1953 (R. 4). On September 2, 1953, he requested, under Rule 23,[3] that he be permitted to exercise his seniority rights and place himself in the position of Bill Clerk, the Group 1 position bulletined on September 8, 1952. The petitioner's request was rejected solely because the seniority date of October 7 made him a junior employee to the incumbent Bill Clerk whose seniority date was September 15, 1952. The petitioner protested, without avail, the refusal to assign him the Bill Clerk position. (R. 4.) Continuously from Sep-

[3] Rule 23 (R. 7) provides that employees whose positions are abolished may exercise their seniority rights over junior employees.

tember 5, 1953, the petitioner has been employed as a Relief Clerk—Chief Caller, a Group 2 position (R. 4).

Alleging that the October 7, 1952, Group 1 seniority date is incorrect and that his correct seniority date is either September 8 or 10, 1952, the petitioner, by this action commenced June 3, 1955, seeks to have his seniority date corrected, to be placed in the Group 1 Bill Clerk position to which a correct seniority date would entitle him, and compensation for wrongful demotion to a Group 2 position (R. 3–4).

On its own motion (R. 12–14), the Union was permitted to intervene (R. 14). Both the Railroad and the Union moved to dismiss the complaint on the grounds of (1) lack of jurisdiction over the subject matter; (2) failure to join an indispensable party, the Bill Clerk; and (3) failure to state a claim upon which relief could be granted (R. 10–11, 14–15). On March 14, 1956, the District Court granted the motions on the third ground alone, expressly rejecting in its order the two other grounds (R. 15–16).

The Court of Appeals affirmed (240 F. 2d 8; R. 17–22). It held, in effect, that it was irrelevant whether, as alleged, the petitioner would have obtained Group 1 seniority as of September 8 or 10, 1952, had his military service not intervened. The court deemed the critical consideration to be, instead, that, had the Group 1 positions become available while the petitioner was in the employ of the Railroad, he would not have had "the absolute right to demand either of these positions over the non-employee applicants [but] * * * could have demanded them only after a determi-

nation of fitness and qualification" (R. 21). In the court's view, because of this factor alone, the governing statute afforded the petitioner no protection whatsoever with respect to seniority in Group 1; the consequence was that, when upon his return from service he immediately qualified for and was promoted to the higher classification, he was not entitled as a matter of statutory right to have his seniority in that classification computed from the date he allegedly would have qualified—and been promoted—had he remained in respondent's continuous employ (R. 20–21). In this connection the court expressed its belief that Section 9 of the Act encompasses "only such established seniority rights as [petitioner] had when he entered the service" (R. 21).

SUMMARY OF ARGUMENT

A. (1). Section 9 (c) (1) of the Universal Military Training and Service Act of 1951, *supra*, p. 3, requires that a veteran returning from military service be restored to his employment "without loss of seniority." Section 9 (c) (2), *supra*, pp. 3–4, contains the Congressional declaration that upon restoration the veteran is to be given "such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment." This declaration in Section 9 (c) (2) is a codification of the "escalator principle" laid down by this Court in construing the Selective Service and Training Act of 1940 which contains a re-employment provision identical to Section 9

(c) (1) of the 1951 Act. As applied by this Court in *Diehl* v. *Lehigh Valley R. Co.*, 348 U. S. 960, reversing, *per curiam*, 211 F. 2d 95 (C. A. 3), it is now clear that under Section 9 of the Act a veteran, who upon re-employment qualifies for and is given an advanced position in his employment, is entitled to a seniority status in that position based upon the date the veteran would have been entitled to qualify for the position had he been continuously employed.

(2). The petitioner, at the time of his induction into the armed forces was, by the terms of the collective bargaining agreement, a Group 2 employee with the respondent Railroad. Upon his return from military service, he was re-employed and, displacing an employee hired in his absence, was immediately promoted to a Group 1 position. He was, however, given a seniority date in the Group 1 position which was later than he would have been entitled to but for his military service. He has, therefore, been denied the seniority benefits guaranteed to him by the statute.

B. (1). In the petitioner's absence, two Group 1 positions became vacant and were bulletined by his employer. By the terms of the collective bargaining agreement the petitioner, had he been present, would have been entitled to bid on either or both positions and, in filling the vacancies, the petitioner would have been entitled to preference, subject to establishing his fitness and ability, over non-employees. Non-employees were employed to fill both vacancies. The petitioner's complaint alleges, in effect, that but for his absence in military service he would have obtained

Group 1 status and seniority on the dates the Group 1 positions were bulletined. Measured by the decisions of this Court and the declaration in Section 9 (c) (2) of the Act, the complaint in this case clearly stated a claim which, upon proof of the facts alleged, would entitle the petitioner to relief. It was, therefore, improperly dismissed.

(2). The fact that the promotion the petitioner would allegedly have received, had he been continuously employed, would have been based upon "fitness and ability" affords no basis for denying the petitioner the seniority benefits of the Act. If petitioner's lack of fitness or ability would have foreclosed promotion, that is a matter for proof not to be assumed on a motion to dismiss the complaint. Moreover, the "absolute right" to promotion test adopted by the Court of Appeals is, as a criterion for the seniority benefits of the Act, unrealistic. Promotion in most industry is implicitly, if not expressly, conditioned upon the employee's fitness, ability or skill. To deny absolutely the seniority benefits solely because the right to promotion is conditioned on ability is, in effect, to sap the continuous employment test of much of its vitality. As a bar to the seniority benefits of the Act, the "absolute right" test should be rejected here—as we believe it has been rejected by the Court in the past.

(3). The petitioner's right to be promoted to the Group 1 position, as well as his "fitness and ability" to fulfill the responsibilities of the position, are, if presently in issue, convincingly evidenced by the fact that, upon his return from military service, he was

immediately promoted to the advanced Group 1 position, displacing the Group 1 appointee hired in his absence. He discharged satisfactorily his duties in the Group 1 position for the better part of a year and was demoted to Group 2 status solely because of seniority.

Dismissal of the complaint, moreover, denies the petitioner the opportunity to present evidence that, as a reasonable probability, he would have obtained Group 1 status when, in his absence, Group 1 vacancies occurred and were filled by outsiders. At the very least, compliance with the mandate of Congress requires that the petitioner be given the opportunity to prove that had he been continuously employed he would have been able to qualify for the Group 1 status on either of the dates the positions in that group became available.

ARGUMENT

Petitioner is entitled to Group 1 seniority as of the date he would have been entitled to qualify for a Group 1 position had his employment with the Railroad not been interrupted by military service

Upon his return from military service, the petitioner was restored to his former employment. He immediately qualified for and obtained the Group 1 position of Assistant Cashier, a position bulletined in his absence and filled by an outsider. By the present action, the petitioner seeks to require his employer to give to him the seniority date in the Group 1 position which he would have had but for the inter-

vention of military service.[4] His right to a Group 1 seniority date which is not set back to a later time by reason of his absence in military service rests upon Sections 9 (c) (1) and 9 (c) (2) of the Universal Military Training and Service Act of 1951 (*supra*, pp. 3–4). By Section 9 (c) (1), Congress has directed that personnel returning from military service be restored to their civilian employment "without loss of seniority." Section 9 (c) (2) provides that one "who is restored to a position * * * should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment."

Section 9 (c) (1) of the 1951 Act is a re-enactment of Section 9 (c) (1) of the Selective Service Act of 1948[5] which, in turn, was a reenactment of Section 8 (c) of the Selective Service and Training Act of 1940.[6] The interpretative rulings of this Court with

[4] With a correct Group 1 seniority date of September 8 or 10, 1952, there can be no dispute that under Rule 23 of the agreement (R. 7) petitioner is entitled to displace the Bill Clerk whose seniority dates from September 15, 1952. Similarly, a correction of his Group 1 seniority date would entitle him to compensation for loss of wages suffered by reason of his wrongful relegation to the Group 2 position. 50 U. S. C. App. 459 (d), *supra*, p. 4.

[5] 62 Stat. 604, 614, as amended, 50 U. S. C. App. 459.

[6] 54 Stat. 885, 890, as amended, 50 U. S. C. App. (1946 ed.) 308.

respect to Section 8 (c) of the 1940 Act and the decision of this Court in *Diehl* v. *Lehigh Valley R. Co.*, 348 U. S. 960, demonstrate that petitioner's complaint states a cause of action and was, therefore, improperly dismissed.

A. A veteran qualifying for and obtaining an advanced position upon his return from military service must be given the seniority date in that position to which he would have been entitled had he been continuously employed

1. Section 8 (c) of the 1940 Act was first before this Court in *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275. There, with respect to the "without loss of seniority" requirement, the Court said (328 U. S. at 288): "Congress recognized in the Act the existence of seniority systems and seniority rights. It sought to preserve the veteran's rights under those systems and to protect him against loss under them by reason of his absence." Similarly, in this same opinion, it was said (328 U. S. at 284): "He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job." And, the veteran's seniority rights were summarized as follows (328 U. S. at 284–285):

> Thus [the veteran] does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war.

From the *Fishgold* case thus emerged the escalator principle—a principle reaffirmed by the Court in *Trailmobile Co.* v. *Whirls*, 331 U. S. 40, 58,[7] and ap-

[7] In the *Trailmobile* case, it was stated that the "restored veteran * * * could not be disadvantaged by his service to the

proved and restated in *Oakley* v. *Louisville & N. R. Co.*, 338 U. S. 278 at 283, as follows:

> * * * [A]n honorably discharged veteran, covered by the statute, [is] entitled by the Act to be restored not to a position which would be the precise equivalent of that which he had left when he joined the Armed Forces, but rather to a position which, on the moving escalator of terms and conditions affecting that particular employment, would be comparable to the position which he would have held if he had remained continuously in his civilian employment.[8]

In Section 9 (c) (2) of the Selective Service Act of 1948 (62 Stat. 614) and Section 9 (c) (2) of the Universal Military Training and Service Act of 1951 (65 Stat. 75), 50 U. S. C. App. 459 (c) (2), *supra*, pp. 3–4, Congress ratified the continuous employment test in the following terms:

> It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) of this section should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his en-

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nation" and was not to be penalized upon his return because of his absence from his civilian job (331 U. S. at 58). The standing of the restored veteran includes "not only his seniority status as of the time he entered the armed forces, but also all that would have accumulated had he remained at work until the date of his reemployment without going into the service" (331 U. S. at 56).

[8] See, also, *Aeronautical Lodge* v. *Campbell*, 337 U. S. 521.

tering the armed forces until the time of his restoration to such employment."

The escalator principle or continuous employment test, as formulated in the *Fishgold, Trailmobile,* and *Oakley* cases and as ratified by Congress in Section 9 (c) (2), received its most recent practical application by this Court in *Diehl* v. *Lehigh Valley R. Co.*; 348 U. S. 960, reversing, *per curiam*, 211 F. 2d 95 (C. A. 3). In *Diehl* the veteran, Diehl, was employed by the Railroad in 1942 as a carman helper. In February 1943, he was given the position of a temporary carman mechanic. Two months later he was inducted into the armed forces. In 1945, upon being honorably discharged from the military service, the veteran resumed his employment with the Railroad as a temporary carman. On January 10, 1949, he completed 1,160 days of actual work in that capacity. Had he remained in the continuous employ of the Railroad, however, he would have completed the 1,160 days on June 1, 1946.

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[9] No important substantive changes with respect to re-employment were made in the 1948 Act because of the policy that "no reemployment rights should be granted to personnel serving under this legislation which would contravene, or take precedence over, reemployment rights now enjoyed by men who already have been in the services, and who are now receiving benefits under the 1940 act." S. Rep. 1268, 80th Cong., 2d Sess., p. 15. This same report refers (p. 16) to Section 9 (c) (2) in terms of a "statement of policy regarding application of the 'escalator principle'", an obvious reference to the "escalator principle" of the 1940 Act announced in *Fishgold* v. *Sullivan Drydock & Repair Corp., supra.* And the Section, of course, differs in no material respect from the statement of that principle in *Oakley* v. *Louisville & N. R. Co., supra.*

On March 1, 1949, the Railroad and the Union entered into an agreement providing that (211 F. 2d at 97):

> A car man helper, who has qualified as a car man mechanic * * * and is presently working on position of a temporary car man mechanic on the effective date of this agreement [March 1, 1949], shall be given the opportunity to make an election within 15 days after the date of his being notified of having worked 1160 days as a temporary car man mechanic to be placed on the permanent car man mechanics' roster with seniority date as of the effective date of this agreement *in the order with other men in which he completed 1160 days' experience* * * * and if so electing shall forfeit his seniority as a car man helper. [Emphasis added.]

Purportedly acting under this agreement, the Railroad placed the veteran, who elected to take seniority as a permanent carman, on the applicable seniority roster in a position junior to certain nonveteran employees. These nonveterans had started working as temporary carmen after the veteran but, because of their continuous employment, had completed the 1,160 days' experience between June 1, 1946 and January 10, 1949 (i. e., before Diehl did so).

Diehl then brought suit under Section 8 (c) of the Selective Training and Service Act of 1940 to compel the employer to place him above the nonveterans on the seniority list. His argument was that, once he had met the qualifying requirements for status as a carman, he was entitled to a seniority date in that status computed on the basis of the date (June 1, 1946) that he would have qualified had he not been inducted into

the military service. In support of this construction of the statute, he pointed to the *Oakley* case, as well as to the later codification of the "escalator principle" in the Selective Service Act of 1948 (50 U. S. C. App. 459 (c) (2)).

The District Court rejected Diehl's argument and dismissed the action. Its reasoning was that the Act required no more than the restoration of the veteran with the seniority to which he was entitled when he entered the military service—i. e., seniority as a helper only; that his temporary assignment to carmen's work had not entitled him, when he left for military service, to seniority as a carman; that his "expectation" to be promoted to a carman on a permanent basis was not protected by the Act; and that the Act did not require military service to be taken as the equivalent of the 1,160 days' experience required by the collective bargaining agreement.

The Court of Appeals affirmed. 211 F. 2d 95. Recognizing that the "continuous employment" test laid down in *Oakley* and codified in Section 9 (c) (2) of the 1948 and 1951 Acts would require giving Diehl status as a carman from the date upon which he would have completed the 1,160 days' experience had he been in the continuous employ of the Railroad, the court expressed the belief (211 F. 2d at 99) that the test conflicted with that provision in Section 8 (c) that the returning veteran "shall be considered as having been on furlough or leave of absence." Finding this purported conflict to be irreconcilable, the court ruled that the "furlough or leave" clause must govern (211 F. 2d at 99). Since Diehl had been ac-

corded the same seniority on the carman's roster as he would have been given under the collective bargaining agreement had he been on an ordinary leave of absence instead of in military service, the court concluded that the requirements of the statute had been fulfilled (211 F. 2d at 99–100).

This Court, citing *Oakley* v. *Louisville & N. R. Co.*, 338 U. S. 278, reversed, *per curiam*, necessarily holding that Diehl, upon his return from military service and upon qualifying for the advanced position, was entitled to a position on the carman's seniority roster based upon the date he would probably have qualified as a carman but for his military service. *Diehl* v. *Lehigh Valley R. Co.*, 348 U. S. 960.[10]

Thus, it is established beyond question that a veteran who under the terms and conditions of his employment would probably have obtained a higher position in his employment, but for the intervention of military service, must, upon return and upon being promoted to the higher position, be given a seniority date in that position that he would have had had he been continuously employed. See also *Mann* v. *Crowell-Collier Publishing Co.*, 239 F. 2d 699 (C. A. 6); *Moe* v. *Eastern Air Lines, Inc.*, No. 16409 (C. A. 5), decided June 18, 1957; *Morris* v. *Chesapeake & Ohio*

[10] Though petitioner's appeal to the court below was specifically based on the holding in *Diehl*, the case is not given even passing mention in the opinion of the Court of Appeals. Compare, *Mann* v. *Crowell-Collier Publishing Co.*, 239 F. 2d 699 (C. A. 6) and *Moe* v. *Eastern Air Lines, Inc.*, No. 16409 (C. A. 5), decided June 18, 1957, where, on parallel facts, *Diehl* was deemed dispositive. See also, *Norris* v. *Robertshaw-Fulton Controls Co.*, 150 F. Supp. 431 (E. D. Tenn.); *Wilson* v. *Illinois Central R. Co.*, 147 F. Supp. 513 (N. D. Ill.).

Ry. Co., 171 F. 2d 579 (C. A. 7), certiorari denied, 336 U. S. 967; *Conner* v. *Pennsylvania R. Co.*, 177 F. 2d 854 (C. A. D. C.); *Norris* v. *Robertshaw-Fulton Controls Co.*, 150 F. Supp. 431 (E. D. Tenn.); *Wilson* v. *Illinois Central R. Co.*, 147 F. Supp. 513 (N. D. Ill.).[11]

2. In partial recognition of petitioner's rights under the collective bargaining agreement and Section 9 of the Act, upon the petitioner's application for reemployment on October 1, 1952, he was, on October 2, placed in the Group 1 position of Assistant Cashier, displacing one McCuan who, as an outsider, was hired to fill the vacancy on September 22, 1952.[12] Petitioner thus resumed his employment in a position he would have been eligible to apply for had he remained in the

[11] Compare, *Bostian* v. *Seaboard Airline R. Co.*, 211 F. 2d 867 (C. A. 4); *Adkison* v. *Tennessee Coal, Iron & R. Co.*, 204 F. 2d 340 (C. A. 5); *Lipscomb* v. *Tennessee Coal, Iron & R. Co.*, 189 F. 2d 708 (C. A. 5); *Special Service Co.* v. *Delaney*, 172 F. 2d 16 (C. A. 5); *Altgens* v. *The Associated Press*, 188 F. 2d 727 (C. A. 5); *Gregory* v. *Louisville & N. R. Co.*, 191 F. 2d 856 (C. A. 6), certiorari denied, 343 U. S. 903; *Raulins* v. *Memphis Union Station Co.*, 168 F. 2d 466 (C. A. 6); *Seattle Star* v. *Randolph*, 168 F. 2d 274 (C. A. 9). These decisions, all prior to and irreconcilable with the *Diehl* case, are of doubtful present value.

[12] Rule 15, R. 7, provides that "An employee returning after leave of absence may return to former position or may, upon return or within three (3) days thereafter, exercise seniority rights to any position bulletined during such absence. Employes displaced by his return may exercise their seniority in the same manner."

Under Section 9 (c) (1) of the Act (*supra*, p. 3), a person restored to employment pursuant to Section 9 (b) "shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, * * *."

Railroad's continuous employ; but his advancement to the Group 1 position was only a partial recognition of his rights since, in advancing him to the Group 1 position of Assistant Cashier, the Railroad fixed his seniority date in Group 1 as October 7, 1952. This seniority date plainly reflected a loss of advantage arising from his absence on military service. His subsequent demotion to Group 2 solely because of lack of seniority demonstrates that the disadvantage arising from the petitioner's military service was real. This disadvantage partakes of a penalty, contrary to the plain dictates of Section 9 of the Act and the teachings of *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275; *Trailmobile Co.* v. *Whirls*, 331 U. S. 40; *Oakley* v. *Louisville & N. R. Co.*, 338 U. S. 278; and *Diehl* v. *Lehigh Valley R. Co.*, 348 U. S. 960, reversing, *per curiam*, 211 F. 2d 95 (C. A. 3). In light of the terms and conditions of his civilian employment, it is clear, we submit, that the October 7, 1952, seniority date denied the petitioner his statutory right to be restored to his employment "without loss of seniority." His complaint which seeks redress for this wrong states a cause of action and was improperly dismissed.

B. Under the terms and conditions of petitioner's employment, had he been continuously employed he would have been entitled to qualify for Group 1 status on September 8 or 10, 1952

1. The petitioner's complaint alleges, in effect, that if he "had continued in [his] employment continuously from the time of his entering the armed forces until the time of his restoration" (Section 9 (c) (2)), he would have obtained Group 1 status on September

8 or 10, 1952. The claim is, of course, based upon events which transpired during his absence from the Railroad's employment and the assertion that he would have been promoted to the Group 1 position is grounded upon the terms and conditions set out in the collective bargaining agreement.[13]

By the terms of the collective bargaining agreement between the respondents, employees covered by the rules of the agreement are "in line for promotion" (see Exhibit A to the complaint, rule 5, p. 4); and employees are entitled to bid for new positions or vacancies (Rule 10. R. 7). With respect to promotions to Group 1 positions, Group 2 employees are

[13] Were the petitioner's *seniority date* a matter to be determined solely by the collective bargaining agreement, the petitioner would have small room for quarrel with the date assigned him. The agreement provides that "[n]o seniority is established in any group unless service in that group is actually performed after being regularly assigned to a position in that group, * * *" (see Exhibit A to complaint, on file with the Court, Rule 19, p. 8). And Rule 4 provides that "[s]enority begins at the time the employe's pay starts in the respective branch or class of service * * *." It was, presumably, pursuant to these Rules that petitioner was assigned a Group 1 seniority date of October 7, 1952, even though his re-employment in Group 1 commenced October 2, 1952 (R. 4). Whether the October 7 date was correct or not under Rules 4 and 19, these rules must give way to the "without loss of seniority" requirement of Section 9 (c) (1) of the Act. It has, of course, long been settled that neither the "practice of employers [nor] agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275, 285; *Moe* v. *Eastern Air Lines*, No. 16409 (C. A. 5), decided June 18, 1957; *Spearmon* v. *Thompson*, 167 F. 2d 626, 630 (C. A. 8), certiorari denied, *sub nom. Delozier* v. *Thompson*, 335 U. S. 886; see, also, *Payne* v. *Wright Aeronautical Corp.*, 162 F. 2d 549, 553 (dissenting opinion) (C. A. 3).

given preference over non-employees, based on fitness and ability (Rule 1 (3) (A), R. 6).

Had the petitioner been continuously employed, he would have been "in line for promotion;" he could, and no doubt would, have bid on either or both the Group 1 promotional positions bulletined on September 8 and 10, 1952; and, as a Group 2 employee, he would have been entitled to preference, based on fitness and ability, over the outsiders who were employed to fill the vacancies. Though there undoubtedly is an element of uncertainty in any determination of the status a veteran would have achieved in his employment had he been continuously employed,[14] the circumstances of this case provide no reasonable basis to doubt that the petitioner, had he been continuously employed, would, as his complaint alleges, have achieved Group 1 status on either September 8 or 10, 1952.

Thus, the complaint and the relief which the petitioner seeks fall within the principle of the *Diehl* case, *supra,* where the veteran's seniority position on the carmen's seniority roster was held to be determined by the date he would probably have qualified as a carman had he been continuously employed. The petitioner's claim is similarly indistinguishable from the claim in *Mann* v. *Crowell-Collier Publishing Co.,* 239 F. 2d 699 (C. A. 6), where, upon qualifying as a journeyman photoengraver, the veteran's

[14] Vacations, illness, change of circumstances, possible layoffs, all are factors which contribute to the uncertainty which inheres in any determination of the status in private employment a veteran would have achieved had he been continuously employed.

seniority date in that capacity was held retroactive to the date he would probably have gained that status but for military service. Neither is this case distinguishable from *Morris* v. *Chesapeake & Ohio Ry Co.*, 171 F. 2d 579 (C. A. 7), certiorari denied, 336 U. S. 967 and *Conner* v. *Pennsylvania R. Co.*, 177 F. 2d 854 (C. A. D. C.), where seniority in advanced positions was back-dated to the point where advancement would probably have occurred had the veterans been continuously employed. See also, *Norris* v. *Robertshaw-Fulton Controls Co.*, 150 F. Supp. 431 (E. D. Tenn.); *Wilson* v. *Illinois Central R. Co.*, 147 F. Supp. 513 (N. D. Ill.). Plainly, when measured by these decisions, the petitioner's complaint states facts which if proved, would entitle him to relief.

2. In holding that the complaint failed to state a claim upon which relief could be granted, the Court of Appeals based its decision on Rule 1 (3) (A) of the agreement (R. 6) which conditions a Group 2 employee's preference for promotion over nonemployees on "fitness and ability." Since petitioner, because of this qualification, would not have had an "absolute right" to either Group 1 position had he not been in the service, he was not, the court held, entitled to the seniority benefits of the Act. 240 F. 2d 8; R. 20–21.

To deny the seniority benefits of Section 9 because the promotion he allegedly would have obtained would have been based on "fitness and ability" is, in effect, to sap the continuous employment test, the statutory measure of veterans' seniority rights, of much of its vitality. Promotion or advancement is rarely inde-

pendent of fitness, ability, or some form of relative skill.[15] Harbison, *Seniority Policies and Procedures as Developed Through Collective Bargaining* (1941), pp. 33–46; Torff, *Collective Bargaining* (1953), pp. 102–111. If not expressed in the collective bargaining agreement itself, fitness, ability and skill are implicit qualifications upon promotional rights which are generally acknowledged by both unions and management. Harbison, *op. cit.*, p. 33. Ability, as a criterion for promotion, is, in short, a part of the common law of industry. Cf., Twentieth Century Fund, *How Collective Bargaining Works* (1945), p. 461. Indeed, Congress has so recognized since an employer's obligation even to re-employ a veteran is conditioned on the veteran being "qualified to perform the duties" the position requires. Section 9 (b) (B) (i), 50 U. S. C. App. 459 (b) (B) (i).

In the *Diehl* case, *supra;* the veteran's right to a carman's status was, if not expressly so, implicitly conditional upon his demonstrating his fitness and ability as a carman helper and a satisfactory completion of a fixed number of days actual work in that capacity. And in *Mann* v. *Crowell-Collier Publishing Co.*, 239 F. 2d 699 (C. A. 6), the collective bargaining

[15] "Of an examination of 400 union agreements made between 1935 and 1939, * * * [n]o stipulations for promotion were made in 238 of the 400 agreements. Straight seniority, unaffected by other considerations, governed promotions in 30. Seniority with ability being deemed 'sufficient' (typical of railway promotions) was laid down in 64. Forty-two agreements provided that, when ability was equal, seniority should govern. Only one agreement specified unqualified ability as sole determinant for promotion." Williamson and Harris, *Trends in Collective Bargaining* (1945), p. 100, n. 21.

agreement expressly conditioned eligibility for promotion to journeyman upon the satisfactory completion of an apprenticeship and the passing of qualifying examinations. Although this factor is not mentioned in the opinion in that case, it was clearly raised by the pleadings. Though the promotion there involved was far short of an "absolute right," the Sixth Circuit, following the *Diehl* case, correctly held that, upon return from service and upon qualifying as a journeyman, the veteran's seniority in that capacity was retroactive to the date he would probably have qualified as a journeyman but for his absence in military service.[16]

In *Morris* v. *Chesapeake & Ohio R. Co.*, 171 F. 2d 579 (C. A. 7), certiorari denied, 336 U. S. 967, promotion to train dispatcher was conditioned upon a telegrapher's passing a qualifying examination. Though promotion hardly could be said to be a matter of "absolute right," upon his qualifying and being promoted to train dispatcher upon his return from service, the Seventh Circuit sustained the veteran's claim to seniority from the date upon which the telegrapher, junior to the veteran, had, in the veteran's absence, been promoted to train dispatcher.

In *Conner* v. *Pennsylvania R. Co.*, 177 F. 2d 854 (C. A. D. C.), freight employees were, by agreement, to be given "consideration" in filling vacancies in the passenger service (177 F. 2d at 855). The established practice was to transfer "qualified" (177 F. 2d at 857) trainmen to passenger service upon

[16] Compare *Gregory* v. *Louisville & N. R. Co.*, 191 F. 2d 856 (C. A. 6), certiorari denied, 343 U. S. 903.

application. Though there clearly was not an "absolute right" to promotion, the court held that, upon return from service and upon being promoted, the veterans were entitled to a seniority date based upon the date they would probably have been promoted had they been continuously employed.[17]

These cases are in full accord with the rulings in the *Fishgold, Trailmobile, Oakley* and *Diehl* cases, *supra,* and correctly apply the "continuous employment" test now appearing in Section 9 (c) (2) of the Act. They constitute the present consistent interpretation[18] of the Congressional command that a veteran be restored to private employment "without loss of seniority"—a command which has its roots in Congressional recognition of the importance of seniority as an attribute of employment in unionized industry,[19] particularly the railroad industry where "the principle of seniority has been developed most completely and is most widely applied." Twentieth Century Fund, *op. cit.*, p. 351.

The importance of seniority is aptly illustrated by this case where, solely because of seniority, petitioner

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[17] The opinion of the Court of Appeals for the Second Circuit in *Borges et al.* v. *Art Steel Co.*, No. 401, Oct. Term, 1956, decided July 8, 1957, would limit the application of Section 9 (c) of the Act to exclude pay increases or promotions awarded on the basis of "skill or merit." That case, however, dealt with the right to promotion as such and is not contrary to the position we urge here since we are not concerned in this case with the right to promotion to Group 1, for which fitness and ability were concededly prerequisites, but with the date of seniority to be assigned to a promotion which has already been granted.

[18] Compare the decisions *contra* cited, *supra*, p. 20, n. 11, all of which antedate and are irreconcilable with the *Diehl* case.

[19] *Aeronautical Lodge* v. *Campbell*, 337 U. S. 521, 526.

has been demoted to a Group 2 status. The seniority disadvantage under which he was placed was attributable only to the fact of his absence in military service. Unless corrected, it is a disadvantage which he will, of course, carry throughout the course of his employment with the Railroad. Just as the matter of less than 30 days seniority has, in this case, spelled the difference between the better-paying Group 1 status and that of Group 2, the same difference may some day spell the difference between employment and unemployment, retirement or nonretirement, promotion or nonpromotion. And to refuse him the seniority date he would have had but for military service, in addition, may well affect his rights of transfer, his choice of shifts and vacation periods, to mention but a few of the incidents of employment commonly affected by the principle of seniority.[20]

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[20] To determine a veteran's seniority date in an advanced position as of the time he would have been entitled to qualify for that position, but for military service, can pose no serious administrative problem for either unions or management. Indeed, the escalator principle, as enunciated by this Court and as applied in *Diehl*, is expressly embodied in the collective bargaining agreements of a number of major railroads including the New York Central, the New Haven, the Boston & Maine, the Santa Fe and the Missouri Pacific. For example, the New York Central system provides in its bargaining provision covering apprenticeship ("Memorandum of Understanding Relative to Rules of the Shop Crafts Hereinafter Listed," between New York Central and other roads, and System Federation 103 representing crafts here involved) that:

"An apprentice who, subsequent to May 1, 1940, entered the armed forces of the United States; whose reemployment rights are protected by the Service Extension Act of 1941; who returns to the railroad company's service within the specified period of forty (40) days; and who thereafter resumes and

3. Even if Rule 1 (3) (A) of the agreement, because of the "fitness and ability" qualification, does not confer an absolute right upon petitioner to seniority in Group 1 as of the date he would have been eligible to bid for promotion, neither is the Rule an absolute bar to proof that he would have been promoted at an earlier date, as it was treated by the court below. Convincing evidence of the fact that the petitioner would have been promoted to Group 1 on September 8 or 10 had he been continuously employed lies in the fact that he was promoted to Group 1 immediately

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completes his apprenticeship shall, upon completion of apprenticeship, be given the same seniority date as mechanic that he would have obtained if there had been no such interruption in apprenticeship.

"*Example.*—Apprentice A began apprenticeship December 1, 1939; was inducted into the U. S. Army December 1, 1941; resumes apprenticeship December 1, 1943; completes apprenticeship December 1, 1945; will be given dating as mechanic December 1, 1942.

"*Exception.*—On the Michigan Central no apprentice will be given hereunder a ranking as mechanic ahead of any apprentice who completed his apprenticeship before March 15, 1942, and therefore did not receive the benefit of the one year prior dating provision.

"Accepted for System Federation No. 103:

"(S) JOHN RIEBER,
Secretary.

"Accepted for Management:

"(S) L. W. HORNING,
Manager, Personnel.

"JANUARY 27, 1943."

Such agreements are on file as a matter of public record with the National Mediation Board pursuant to Section 5, third (e) of the Railway Labor Act, 48 Stat. 1195, as amended, 45 U. S. C. 155. Agreements of similar import are to be found in the oil industry, the automobile industry, and the steel industry.

upon his return from military service. And the fact that he was promoted, and did displace the outsider hired but ten days earlier, indicates that the Railroad itself recognized his right to the Group 1 position.

In any event, since there was nothing before the trial court to establish a lack of ability or fitness on the earlier dates, that was not a fact to be assumed on a motion to dismiss, but was manifestly a matter of proof to be developed at a trial. In this respect, it is significant that while arguing that the petitioner did not have an "absolute right" to a Group 1 position, neither respondent, by answer or otherwise, has ever suggested that the petitioner's "fitness and ability" were not fully adequate for promotion to Group 1. And if the petitioner's "fitness and ability" is open to question, again we think that strong evidence of his fitness and ability lies in the fact that upon his return from military service, within a month after the Group 1 positions were first bulletined, the petitioner was immediately permitted to displace the junior of the two outsiders employed to fill the bulletined positions. From October 2, 1952 to September 4, 1953, he discharged the responsibilities of the Group 1 position with apparent satisfaction and was relegated to Group 2 status solely because of his seniority. These circumstances have, of course, been given no consideration by the courts below although their probative value, in resolving an inquiry as to where petitioner would have been in his private employment but for his military service, would seem to be beyond contradiction.

Moreover, by judging the merits of the petitioner's claim solely on the basis of the language of Rule 1

(3) (A) of the agreement, the Court of Appeals resolved the petitioner's right to promotion without benefit of evidence of the interpretation given Rule 1 (3) (A) by the Railroad and the Union. Similarly, by disposing of the case on the complaint alone, petitioner is denied an opportunity to prove that the preference guaranteed Group 2 employees over non-employees in the agreement is by the custom and practice of railroads tantamount to a right of sufficient certainty to sustain a determination that petitioner would have probably obained Group 1 status on September 8 or 10 had he remained continuously in the Railroad's employ. Though interpretation and practice by the parties to the agreement are frequently the most reliable basis for determining rights claimed to have evolved from the agreement, these factors have received no consideration by the courts below.[21]

Therefore, even if the case be treated as one in which the issue is whether the petitioner was entitled to promotion to Group 1, rather than what is the appropriate seniority date in Group 1 for a returned veteran who has been found fit and able and has in fact been promoted, a minimum compliance with Section 9 (c) (2) would require that the petitioner be given the opportunity to prove as a reasonable probability that had he been continuously employed he

[21] In contrast to the summary procedure followed in this case, the *Mann*, *Morris* and *Conner* cases, *supra*, were before the courts of appeals after the development of a full record in the district courts. Significantly, in those cases, the employee's right to promotion was predicated largely upon the employer's promotional practice as demonstrated at trial.

would have been promoted to Group 1 at the earlier date. Dismissal deprived the petitioner of that right.

The respondent union's contention (Brief in Opposition, page 5) that jurisdiction over the parties and the subject matter of this suit is vested exclusively in the National Railroad Adjustment Board by the Railway Labor Act (48 Stat. 1185, 45 U. S. C. 151, *et seq.*) is without merit. Section 9 (d) of the Universal Military Training and Service Act of 1951, *supra*, p. 4, in common with predecessor acts, specifically provides for the enforcement of reemployment rights by conferring jurisdiction upon the district courts "[i]n case any private employer" fails to comply with the reemployment provisions of the Act. Congress treated veterans' reemployment rights as a particular type of dispute and provided a particular remedy. The court below noted (240 F. 2d at 10–11; R. 20):

> The mandate of the statute is clear and it does not condition the right to institute and maintain such an action upon prior exhaustion of the administrative procedure under the Railway Labor Act. Inasmuch as this type of labor dispute is peculiar to veterans and the statute specifically applies to veterans as a class, prior exhaustion of administrative procedures under the Railway Labor Act is unnecessary.

See also, *Moe* v. *Eastern Air Lines, Inc.*, No. 16409 (C. A. 5), decided June 18, 1957. It should also be noted that the jurisdictional infirmity here asserted would likewise have been present in many of the decisions of this Court and the courts of appeals cited

and discussed above. These decisions implicitly contradict respondent's contention and are indicative of its lack of substance.[22]

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the Court of Appeals should be reversed.

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AUGUST 1957.

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[22] Similarly unsubstantial is the Union's contention, made in the court below, that the complaint is defective because it assertedly fails to join an indispensable party. Again, the statute is dispositive. Section 9 (d), (*supra*, pp. 4–5) expressly provides that "only the employer shall be deemed a necessary party respondent to any such action."

The defense of laches suggested by the Union (Br. in Op., p. 7) was raised for the first time in the Court of Appeals. While it is open to question whether the Union has any standing to assert this defense (cf., *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275), laches, in any event, is a factual defense inappropriate for consideration on a motion to dismiss.

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